

Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of B.J.W.,)
)
And)
)
Alexandria Community School) **Article 7 Hearing No. 1268.01**
Corporation)
)
Appeal from a Decision by)
Joseph R. McKinney, J.D., Ed.D.)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

On February 7, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on February 8, 2002. A telephone pre-hearing conference was held on February 19, 2002. As a result of the pre-hearing conference, the IHO issued a Pre-hearing order on March 8, 2002, that established the issues for the hearing:

1. Whether the School has failed to provide a free and appropriate education to the Student because the School has not provided appropriate physical therapy service.
2. Whether the School has failed to provide or offer an extended school year to the Student in violation of Article 7.

The parties also agreed to have the IHO hear these two issues pursuant to Section 504 of the Rehabilitation Act of 1973.¹

¹29 USC §794.

The hearing was scheduled for April 11, 2002. On April 10, 2001, the Student filed a motion for extension of time which was granted by the IHO. The IHO contacted the parties on May 21, 2002, and was informed the parties preferred not to hold the hearing until school started in August, 2002. On August 21, 2002, the IHO contacted the parties and scheduled a status conference for August 26, 2002. On September 11, 2002, the IHO issued an order of continuance, setting the hearing date for October 4, 2002, with the decision to be rendered by October 25, 2002. Subsequent to the hearing, the IHO found he needed additional time to render the decision and contacted the parties who agreed to a decision date of October 29, 2002.

The Written Decision of the IHO

The IHO's written decision was issued on October 29, 2002. The following information is a summary of the 34 Findings of Fact determined by the IHO.

The Student is 6 ½ years old. The Student resides with the Student's adoptive parents and attends the local elementary school. The Student has been diagnosed with cerebral palsy.

The Student attended a preschool program beginning in March, 2000. He received physical, occupational and speech therapy as part of the program. A physical therapy report prepared by the physical therapist when the Student was 61 months old placed his gross motor skills in the range of 54-60 months. The physical therapist said he continued to have good developmental skills.

The Student attended full-day kindergarten during the 2001-2002 school year. At an initial case conference committee meeting held on August 29, 2001 and September 7, 2001, the Student was determined eligible for special education with an orthopedic impairment and a communication disorder. The Student was placed in a general education kindergarten classroom with speech therapy and a resource room in the afternoon.

A physical therapy evaluation dated October 10, 2001, indicated the Student's gross motor skills were at the 72-month level. The Student was 68 months old at the time. The therapist concluded that the Student's gross motor skills did not demonstrate delays in motor development. The therapist did note in her report that the classroom teacher observed the Student lose his balance frequently and on occasion fall at school.

The physical therapist determined the Student needed physical therapy once a week in the school setting because of his lower extremity spasticity and gait deviations. Physical therapy goals and objectives became part of the Student's IEP and physical therapy services began once a week in October, 2001. The therapist prepared a written home exercise program for stretching and strength. The Student's annual goal was to improve balance and bilateral high level mobility such as jumping and skipping.

The Student's first grade teacher reported that the Student experienced difficulties walking with the class in a straight line, occasionally fell out of the chair, and found it difficult to sit on the floor. The Student's father indicated the Student runs better than the Student walks. The Student actively participates in sports.

In October and November, 2001, the father spoke with the physical therapist and indicated the Student had been to the Riley Hospital Clinic and the doctor indicated the Student might receive Botox injections to loosen the Student's foot muscles for surgery. The father indicated that if the Student received Botox injections the doctor indicated the Student would need much more aggressive physical therapy than what he was receiving at school.

A case conference committee meeting was held on November 12, 2001. The physical therapist attended this meeting. The physical therapy evaluation and goals and objectives were discussed. The therapist believed that once weekly sessions would be appropriate while the parents requested that the Student receive more physical therapy at school. The therapist explained the purpose of physical therapy at school and maintained that if the parents or physician felt that more physical therapy was needed it should be provided outside of school. She referred to a medical model vs. an educational model.

The School received a referral/prescription for weekly physical therapy from Dr. Kayes dated October 31, 2001. The School also received a note on a prescription pad from Dr. Carpenter that mentioned Botox injections dated October 31, 2001. A case conference committee meeting was held on December 19, 2001. The parent's and Student's attorney attended this meeting. The physical therapist for the school, who is employed by St. John's Hospital (St. John's has a contract with the School) left the meeting under advice from St. John's not to attend without an attorney. Although the parents requested physical therapy three times per week, the School informed the parents the Student was mobile enough to fully participate in the educational setting and was fully able to participate in a field trip. The school explained that the therapy the parents were requesting fell into the rehabilitation realm, a medical concern, rather than an educational concern.

A case conference committee meeting was held on February 8, 2002. The Student's kindergarten progress report indicated he was doing very well. The Student's oral presentation was improved over the beginning of the year. The case conference committee discussed the results of a psycho-educational evaluation. Physical therapy was not discussed at this meeting.

The annual case review was held on March 15, 2002. The Student's goals and objectives for the 2002-2003 school year were discussed. An extended school year for speech therapy was agreed upon. The Student's annual progress report for physical therapy was reviewed. The March 13, 2002, report indicated that the Student has well-developed gross motor skills for any 6-year-old child. The report also noted the Student was involved in many activities outside of school, including basketball and baseball. New physical therapy goals were included in the IEP.

Sometime after February 20, 2002, the parents provided the School with a prescription from Dr. Beahm for physical therapy at least three times per week. The School was also provided with a prescription from Dr. Kayes for physical therapy three times per week. Dr. Beahm testified that he is a pediatrician who has seen the Student and he has no record of the February 22, 2002, prescription. He indicated that a member of his staff might have signed the prescription. He said he was not qualified to say how often a patient needs physical therapy. The School received an additional referral form from Dr. Beahm on September 5, 2002, for physical treatment that did not indicate how often the Student should receive physical therapy.

Dr. Kayes is a pediatrician specializing in cerebral palsy. His recommendation for physical

therapy was based on the Student's physical needs as opposed to his educational needs. He also indicated that the extent or duration of physical therapy should be a joint decision between the doctor and physical therapist.

Although the Student showed increased tightness in his foot after summer vacation, the therapist felt it was probably due to unfamiliarity with their routine. The therapist believes that physical therapy provided once per week is sufficient to provide a benefit to the Student's educational program. The Student's occasional lack of balance and stumbling have not detracted from his educational or social needs at school. The Student actively plays with other students on the playground.

The physical therapist maintained good communication with the Student's general education teacher and gym teacher. Although a general education teacher was not present at two of the case conference meetings, the physical therapy program was not impacted.

The Student's March 15, 2002, annual goal for physical therapy is to improve mild gait deviations so the Student is better able to move from classroom to classroom.

From these Findings of Fact, the IHO reached 2 Conclusions of Law:

1. The School is providing an appropriate level of physical therapy to the Student in order that he benefits from his special education program. The School is in compliance with 511 IAC 7-28-1 and 7-28-1(i).
2. The School has not denied the Student a free and appropriate education because it did not provide or offer the Student an extended school year program for physical education during the summer of 2002. The lack of an extended summer school physical therapy program did not in any way thwart the Student's education performance.

Based on the foregoing, the IHO ordered the School to continue to implement the current IEP.²

Appeal to the Board of Special Education Appeals

On November 22, 2002, the Student, by counsel, requested an extension of time in which to file a Petition for Review. By order dated November 25, 2002, the request for extension of time was granted by the Board of Special Education Appeals (BSEA) such that the petition was to be filed by December 20, 2002, with the decision by the BSEA due by January 20, 2003. The Petition for Review was timely filed on December 20, 2002. The Student also requested oral argument before the BSEA.

On December 23, 2002, the School requested an extension of time in which to file its response to the

²The IHO rendered a similar decision based upon the issues raised under Section 504 of the Rehabilitation Act of 1973. This decision does not address those issues as the BSEA does not have jurisdiction over Sec. 504. The IHO advised the parties of their appeal rights under Sec. 504.

Student's petition. By order dated December 23, 2002, the School was granted an extension until January 13, 2003, in which to file its reply. The timeline for BSEA's decision was extended until February 13, 2003. The School timely filed its Response to the Petition for Review on January 13, 2003.

Petition for Review

The Student raises the following issues on appeal:

1. The IHO failed to properly assess the need and the impact of not providing three physical therapy sessions per week, and used the wrong standard by constantly referring to three physical therapy sessions being a medical model.
2. The IHO failed to properly assess the failure of including a general education teacher at several case conferences.
3. The IHO failed to address the failure to satisfy the requirements of the IEP to provide one physical therapy session per week.
4. The IHO failed to assess the need for an extended school year given the Student's regression over the summer.
5. The School's failure to provide speech therapy as required by the IEP has denied the Student a free and appropriate education.

Response to Petition for Review

The School responded to the Student's petition by arguing:

- A. The School is providing adequate physical therapy services.
- B. The School is not required to provide physical therapy during an extended school year.
- C. Case conference composition and speech therapy are beyond the scope of this appeal.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated January 17, 2002. Review was set for February 5, 2003, in Indianapolis, in the offices of the Indiana Department of Education. All three members of the BSEA appeared on February 5, 2003. After review of the record as a whole and in consideration of the Petition for Review and the Response thereto, the BSEA makes the following determinations.

Combined Findings of Fact and Conclusions of Law

1. The Student timely appeals from the decision of the IHO. The School timely responds. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
 - a. arbitrary or capricious.
 - b. an abuse of discretion.
 - c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
 - d. in excess of the jurisdiction of the IHO.
 - e. reached in violation of an established procedure.
 - f. unsupported by substantial evidence.511 IAC 7-30-4(j).
3. The Student has been diagnosed with cerebral palsy. The Student has been identified as eligible for special education and related services as a student with an orthopedic impairment and communication disorder.
4. The Student's IEP provides for physical therapy services to be provided one time per week. This level of service has enabled the Student to receive benefit from his special education program. The Student has well-developed gross motor skills for a Student of his age.
5. The School has offered and provided an appropriate level of physical therapy services.
6. Although the Student exhibited increased tightness in his foot after the summer break in September, 2002, there was no evidence of significant regression or a significant period of recoupment required to return to previous levels of motion.
7. The School was not required to provide physical therapy as an extended school year service as the Student did not require the service in order to benefit from his special education program.

8. The Student complains on appeal that the IHO failed to properly assess the failure to include a general education teacher at several case conferences, and failed to provide speech therapy as identified in the Student's IEP. The Student's initial request for a hearing does not identify these as areas of concern. The pre-hearing order issued by the IHO after the initial pre-hearing conference identified the issues, which did not include the failure to include a general education teacher at case conferences, or the lack of speech therapy services. The hearing proceeded upon the issues identified by the IHO in the pre-hearing order. The Student never objected to the identification of the issues, nor did the Student ever specifically request that additional issues be addressed by the IHO in the hearing. These issues, not having been raised before the IHO, are therefore waived on appeal.
9. The issues before the IHO concerned the appropriate level of physical therapy services. The IHO inadvertently addressed physical "education" in his second conclusion of law. The IHO's conclusion should therefore be amended to reflect his intention.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. Conclusion of Law No. 2 is modified to read as follows:

The School has not denied the Student a free and appropriate education because it did not provide or offer the Student an extended school year program for physical therapy during the summer of 2002. The lack of an extended summer school physical therapy program did not in any way thwart the Student's education performance.

2. In all other respects, the written decision of the IHO is upheld.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: February 5, 2003

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C 4-21.5-5-5 and 511 IAC 7-30-4(m).